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IN THE

Supreme Court of the United States

October Term, 1969
No. 898

FRANCIS D. WHITE and GERTRUDE W. WHITE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Francis D. White and Gertrude W. White, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 10, 1969.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The unreported opinion of the District Court for the Western District of New York on the motion to suppress evidence in this proceeding also appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 10, 1969. A timely petition for rehearing was denied on November 3, 1969, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 (2) of the Rules of this Court.

Question Presented

Whether, in a case referred to the Intelligence Division of the Internal Revenue Service for a criminal tax fraud investigation, the Special Agent assigned to such investigation must give the warnings of constitutional rights set forth in *Miranda v. Arizona*, 384 U. S. 436, at the outset of interrogations by him of the taxpayer who is the subject of the investigation where such taxpayer was not represented by counsel during such interrogations.

Constitutional Provisions Involved

Fourth Amendment—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment—"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Sixth Amendment—"In all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defence."

Statement of the Case

Petitioners herein were convicted in the District Court for the Western District of New York of violations of 26 U. S. C. § 7201 and 26 U. S. C. § 7206 (1) relating to wilful evasion of federal income tax and the wilful filing of false income tax returns, for the years 1958 through 1961. The Court of Appeals for the Second Circuit affirmed the judgments of conviction. The jurisdiction of the District Court was based on 18 U. S. C. § 3231.

Petitioner Francis D. White (herein called Francis) was engaged during the years in question in the operation of an *unincorporated* trucking business in Lockport, New York, known as White's Transportation. Petitioner Gertrude W. White, his wife, was employed as a bookkeeper in this business. The Whites filed joint income tax returns for the years here involved with the District Director of Internal Revenue in Buffalo, New York.

Prior to trial, petitioners herein moved to suppress various statements, documents and other matter, including evidence obtained as a result of leads therefrom, as having been obtained in violation of the petitioners' rights under the Fourth, Fifth and Sixth Amendments to the Federal Constitution. Following an evidentiary hearing, the trial court by decision and order dated July 22, 1968 (Pet. A. 27-31) denied the motion to suppress.* In significant part, the facts developed at the pre-trial hearing were as follows:

* References to the printed Appendix filed in the Court of Appeals are shown as A.; to the appendix to this petition as Pet. A.; to the transcript of the pre-trial evidentiary hearing as H.; and to the transcript of the trial testimony as Tr.

An audit of the petitioners' income tax return for 1959 was commenced by Revenue Agent Judson Heck in March of 1962 (H. 9, 10). Thereafter, he submitted a fraud referral report to his superiors, and, on June 7, 1962, Special Agent Charles Martin, Jr. was assigned to conduct a joint investigation with Revenue Agent Heck of the defendants' tax return (H. 11). On June 18, 1962, Martin and Heck met in Lockport to discuss Heck's findings (H. 11). On that day, Heck telephoned Francis White and made an appointment to see him the next day (H. 12). On June 19, 1962, Heck and Martin went to the offices of White's Transportation at 38 Mill St. in Lockport to keep their appointment. They were met by James Cornell, Francis' accountant (H. 13). Francis was not present at the time (H. 13). Martin was introduced to Cornell by Heck as a Special Agent, Intelligence Division (H. 14). Cornell inquired as to why the Intelligence Division was in the case (H. 14). Martin told him that Francis possibly was not reporting all of his interest and dividend income, was acquiring equipment in substantial amount against which he had no liabilities and had a bank account which Heck had found in Newfane, New York (H. 14). Cornell said that he was sure that he could explain all these to their satisfaction (H. 14).

Five or ten minutes later, Francis came into the office (H. 16, 17). Heck introduced Martin as a Special Agent, Intelligence Division, and Martin showed Francis his pocket commission, but not his badge (H. 18). Martin then told Francis that he was there because Heck had referred information to his office that Francis had not been reporting some of his dividend and interest income, that his trucks had no liabilities against them and that he had a substantial checking account in Newfane to which he was making

deposits (H. 18). Francis said that he thought he could explain those things to their satisfaction (H. 18, 19). Martin then stated that he would like to conduct an informal interview with him and would like him to produce his personal and corporate records for the years 1955 through 1961 (H. 19). Martin stated further that Francis was not required to turn over personal records or to answer any questions (H. 19). Francis responded that he did not know that he did not have to do this but would be willing to cooperate (H. 19). Martin did not tell Francis why he was not required to turn over records or answer questions (H. 19).

At Cornell's suggestion, the meeting was then transferred to Cornell's office to avoid interruptions (H. 21). Those present were Martin, Heck, Cornell and Francis (H. 21). The interview there lasted from one and a half to two hours (H. 22) and concerned Francis' personal history, net worth and business transactions (H. 21, 22). At the end of the interview, Francis agreed to furnish Martin with books and records of himself and White's Transportation for the years 1955 through 1961 (H. 43). It was agreed that these would be furnished through the accountant Cornell (H. 43, 44).

As the District Court found (Pet. A. 29), it is undisputed that Francis was never advised of his right to counsel or that anything he said might be used against him (H. 24). He was not advised that if he was unable to afford counsel, counsel would be furnished for him (H. 24). No attorney was present (H. 27). The possibility of a criminal prosecution was never mentioned, although Martin testified that the likelihood existed at that time. Martin could not recall that he ever mentioned the word "fraud" (H. 57).

Subsequent to the interview on June 19, 1962, Martin requested and obtained through Cornell various journals, ledgers, payroll records, bank statements and checks and other records of White's Transportation which Martin testified assisted him in making his ultimate recommendation for criminal prosecution (H. 35, 36).*

Martin and Heck had no further contact with Francis until July 9, 1963 (H. 47) when a second interview took place at the request of Martin who arranged for it through Cornell (H. 46). This interview was held at the Internal Revenue Service offices in the Post Office Building in Lockport (H. 47). Those present were Martin, Heck, Cornell and Francis (H. 47). No warnings of any type were given at this interview (H. 48), although Martin testified that criminal prosecution was a little closer at that time (H. 49). A third and final interview with the same persons present was held at the same place in Lockport on November 7, 1963 (H. 52). Again, this interview was arranged by Martin through Cornell (H. 52). No warnings of any kind or statements as to Francis' right were made prior to the commencement of this interview (H. 59).

Only one interview was ever held with Gertrude White. That interview was held on November 7, 1963 at the Internal Revenue Service offices in Lockport, preceding the interview with Francis held on the same date. Those present were Francis, Gertrude, Martin, Heck, Cornell and Marion Ward, an accountant associated with Cornell (H. 53). After the interview started, Martin advised Gertrude that she was not required to answer any of their questions (H. 54, 55). No other warning or statement of rights was

* The Government conceded on brief (p. 33) in the Court of Appeals that "virtually the whole case was based upon the personal books and records of appellants and of White's Transportation."

given to Gertrude (H. 55). Martin could not recall whether he told her that he was an Intelligence agent or whether he showed her his credentials (H. 55).

At the trial itself, which commenced on September 17, 1968, substantially the same evidence was adduced (Tr. 1142-1158, 1931-2026). The trial court again denied motions to suppress (A. 3-5).

REASONS FOR GRANTING THE WRIT

1. The decision herein is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Dickerson.*

There is no dispute that the warnings of constitutional rights set forth in *Miranda v. Arizona,* 384 U. S. 436 (1966) were not given in the instant case. The record clearly discloses, and both Courts below have found, that petitioners were not advised that anything they said might be used against them and were not informed as to their right to counsel or to the assignment of counsel. Petitioners were not represented by counsel at any of the interrogations by the Special Agent. The Court of Appeals held, nevertheless, in reliance on its prior decisions in *United States v. Mackiewicz,* 401 F. 2d 219 (C. A. 2, 1968) and *United States v. Squeri,* 398 F. 2d 785 (C. A. 2, 1968), that "Francis' confrontations with the Service's Intelligence Division were not inherently coercive, and he and his wife were not entitled to suppress evidence against them garnered from that confrontation on the basis of Miranda". (Pet. A. 15)*

* In its opinion, the Court of Appeals referred only to the interrogations of Francis which took place at his place of business and at Cornell's office on June 19, 1962. As the District Court found, and the record shows, Francis was also interrogated by the Special Agent on two subsequent occasions (July 9 and November 7, 1963) at the Internal Revenue Service offices in Lockport, which was also the site of the only interview ever held by the Special Agent with Gertrude White.

In so holding, the decision of the Court of Appeals herein is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Dickerson*, 413 F. 2d 1111 (decided July 28, 1969, rehearing denied Sept. 5, 1969). The Court of Appeals herein appears itself to have so regarded *Dickerson*, for, after listing decisions of seven other Circuits stated to be in accord with its view in the instant case, it lists *Dickerson* as "Contra".

The facts in *Dickerson* differ from the facts in the instant case in no essential respect. There, as here, there were interrogations by the Special Agent with the taxpayer who was the subject of a criminal tax investigation; there, as here, the taxpayer was not represented by counsel during the interviews; there, as here, the full *Miranda* warnings were not given to the taxpayer. In neither case was the taxpayer in custody in the sense of arrest and physical detention; in neither case was the taxpayer advised that he was the subject of a criminal investigation. Yet, on almost identical factual patterns, the two Courts of Appeals have reached diametrically opposed results.*

Moreover, the sweep of *Dickerson* is such as to make futile any attempted factual distinction between the cases. For, in broadly holding that *Miranda* warnings must be given to the taxpayer at the inception of the first contact with the taxpayer after a case has been transferred to the

* The sole distinction on the facts between the two cases is that, in the instant case, petitioners were advised that they need not answer questions or produce documents. Plainly, this single circumstance, unaccompanied by any warning that petitioners were the subject of a criminal investigation, that any statements or records given could be used against them or that they had the right to have counsel present, would not have altered the result under *Dickerson*. For *Dickerson* not only requires the full *Miranda* warnings but emphasizes the importance of a warning "as to the *consequences* of waiving the right to remain silent." 413 F. 2d at 1116 (italics added). In the instant case, as in *Dickerson*, there was no warning of any kind as to such consequences.

Intelligence Division, the Court in *Dickerson* stated (p. 1117):

> " * * * We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind. * * * "

In the language quoted, the Seventh Circuit has clearly stated that the nature of a criminal tax investigation is such that the *Miranda* warnings must be given by a Special Agent without regard to the taxpayer's frame of mind. Manifestly, the application of this rule to the instant case would have required a decision in favor of the petitioners. Moreover, we point out that, in its petition for rehearing in *Dickerson,* the Government itself acknowledged that the *Mackiewicz* and *Squeri* decisions, *supra,* relied upon by the Court of Appeals in the instant case, are in conflict with *Dickerson,* stating (p. 5) that, although some warnings were given in the former cases, "under the rule of the majority opinion [in *Dickerson*] these cases would be erroneous because the *full* warnings were not given". (italics supplied by Government.) For the same reason, the instant case is also in conflict with *Dickerson.*

Finally, we submit that the fact that *Dickerson* limited application of the rule there announced to interrogations taking place after the date of that decision is no basis for distinction of the case at bar. If this Court should hold for the petitioners in the instant case, the date of the decision of this Court would be the only logical cut-off date, assuming, without conceding, that a cut-off date should be adopted.

2. The decision herein conflicts in principle with prior decisions of this Court.

It is respectfully submitted that the decision of the Court of Appeals herein conflicts in principle with the decisions of this Court in *Escobedo v. Illinois,* 378 U. S. 478 (1964); *Miranda v. Arizona,* 384 U. S. 436 (1966); *Mathis v. United States,* 391 U. S. 1 (1968); and *Orozco v. Texas,* 394 U. S. 324 (1969).

In its *Orozco* opinion, this Court recently had occasion to emphasize the disjunctive nature of its remarks in *Miranda* (384 U. S. at 477) to the effect that the *Miranda* warnings as to constitutional rights must be given when the interrogated person is "in custody at the station *or otherwise deprived of his freedom of action in any way*". (italics supplied by this Court). Earlier in the *Miranda* opinion, the definition of custodial interrogation was similarly couched in disjunctive language; the Court stating (p. 444):

> "* * * By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or* otherwise deprived of his freedom of action in any significant way. * * * " (italics added.)

The foregoing would make it seem clear that custody, for purposes of *Miranda,* is not limited to custody in the sense of physical arrest and detention but embraces any confrontation in which the person interrogated is deprived of his freedom of action in a significant way. Or, as the Seventh Circuit in *United States v. Dickerson, supra,* at p. 1114, put it, " * * * custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. * * * "

This broader view of what *Miranda* actually held is important in the setting of a criminal tax investigation which ordinarily does not involve arrest or physical detention. For, in the context of such cases, the Courts of Appeals have generally tended to take a narrow view of the applicability of *Miranda* requirements and, in substance if not in words, to equate custody with actual arrest or detention. We respectfully submit that these decisions have fallen into error on two grounds: (1) by failing to recognize that the *Miranda* doctrine may apply to a non-custody as well as a custody case and (2) by taking too little account of the essentially coercive nature of an examination by a Special Agent.

This mistaken concept as to the scope of *Miranda* has led some Courts of Appeals summarily to dispose of the *Miranda* issue in criminal tax cases by the simple finding that the taxpayer in question was not in custody. Thus, *e.g.*, in *United States v. Marcus*, 401 F. 2d 563, 566 (C. A. 2, 1968), cert. denied 393 U. S. 1023 (1969), the Second Circuit resolved the matter with the single statement that since the taxpayer "was not in custody and he was fully aware that his activities were the subject of a tax investigation", the *Miranda* doctrine would not apply. Similarly, in *United States v. Squeri*, 398 F. 2d 785, 789 (C. A. 2, 1968), relied upon by the Court of Appeals in the instant case and decided before the Seventh Circuit's decision in *Dickerson*, it is flatly stated that the "view that the Miranda requirements do not apply to *noncustodial* questioning by IRS agents has been adopted by every Court of Appeals which has passed on this question * * * " (italics added).

With all due respect, we submit that the conclusion of *Dickerson* that the "inquiry does not end with custody or its absence" is the correct interpretation of *Miranda*, for,

as has previously been shown, *Miranda* itself did not limit its coverage to custody cases but rather made clear that the doctrine would apply to non-custody cases in which there was a deprivation of freedom of action in a significant way. We respectfully submit that the decision of the Court of Appeals herein in relying on *Squeri* and similar cases misconstrued the import of this Court's decision in *Miranda* and reached a result contrary in principle to *Miranda*.

We submit, additionally, that the majority of the Courts of Appeals, including the Court below in its decision in the instant case, have misapprehended the essential nature of an interrogation by a Special Agent. To describe such interviews as "entirely voluntary" and as meetings in which the taxpayer's "freedom of action [is] not in anyway impaired", as the Second Circuit did in *Squeri* (398 F. 2d at 789), and to say, as the same Court did in *United States v. Mackiewicz*, 401 F. 2d 219, 222 (C. A. 2, 1968) (also relied upon by the Court of Appeals in the instant case), that a taxpayer in such an interview is "free to come and go as he [wishes]" and "free to ask the agents to leave", is, we respectfully submit, wholly unrealistic. The Seventh Circuit in *Dickerson* has rejected this view completely, for it specifically based its decision on its "examination of the circumstances surrounding criminal tax investigations generally" and it concluded that "the objective circumstances of such confrontations with government authority warrant the [Miranda] warnings" (413 F. 2d at 1117).

We submit that an interview with a Special Agent is by its nature "a coercive examination", as Mr. Justice Douglas described it in his dissent to the denial of certiorari in *Thomas v. United States*, 386 U. S. 975 (1967). This is the view held by writers in the field, at least one of whom has complained that decisions of the lower courts on the *Mir-*

anda issue "seldom reflect sufficient understanding of the investigative process in criminal tax cases". Lipton, *Constitutional Issues in Tax Fraud Cases,* 55 A. B. A. J. 731, 733 (1969). See also Andrews, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage",* 53 Iowa L. Rev. 1074, 1112-1114 (1968); Comment, *Constitutional Rights of the Taxpayer in a Tax Fraud Investigation,* 42 Tul. L. Rev. 862, 874 (1968). The nub of the matter was succinctly stated by Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation,* 44 Taxes 660, 683 (1966) as follows:

> " * * * When the Revenue Agent and the Special Agent visit [a taxpayer], he is under the overwhelming apprehension that he has to cooperate and supply them with the books and records which they seek. In his mind, he has no freedom to act in any other way. * * * "

We respectfully submit that the compulsive atmosphere inhering in an interrogation by a Special Agent produces exactly the type of deprivation of freedom to act which this Court has indicated would make the *Miranda* warnings essential. For in that situation, as in *Miranda* itself, there are "inherently compelling pressures which [work] to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. * * * " (384 U. S. at 467).

In addition, we contend that, whatever may be the nature of an interview with a Special Agent, when a tax investigation has reached the accusatory stage of referral to the Intelligence Division, *Miranda* requires that the taxpayer be afforded an opportunity to make an intelligent decision as to the assertion or waiver of his constitutional rights, a decision which he cannot reach in the absence of warnings as to the nature of the investigation, as to the use against him of incriminating statements and as to his right to coun-

sel. As the Court noted in *Dickerson* (p. 1114), the Government appears to have recognized that "ignorant compliance with the requests of the authorities can no longer be equated with a valid waiver of constitutional rights". And, as *Dickerson* further stated (*id.*), "Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in *Miranda*. * * * "

For the foregoing reasons, we submit that the decision of the Court of Appeals herein conflicts in principle with the *Miranda* and *Miranda*-related decisions of this Court.

3. The issue herein is a recurring one of great importance to taxpayers generally and to the proper administration of the revenue laws.

As the Government stated in its petition for rehearing in *Dickerson* (pp. 1, 6), the question presented herein is one of "exceptional importance". The recurring nature of the issue is illustrated by the large amount of litigation which has already taken place (see cases collected and collated in *Frohmann v. United States,* 380 F. 2d 832, 836 (C. A. 8, 1967), cert. denied 389 U. S. 976 (1967) and in *Cohen v. United States,* 405 F. 2d 34, 36-38 (C. A. 8, 1968), cert. denied 394 U. S. 943 (1969)). That the issue is one of great importance to taxpayers generally and to the proper administration of the revenue laws would seem obvious. Whether a taxpayer is entitled to warnings which reveal the true nature of a tax investigation, and the taxpayer's rights therein, is a matter which affects all taxpayers. It is similarly important for the proper administration of the revenue laws that the ground rules for such investigations be known to all.

The importance of this issue has not been diminished in any significant way by the recent efforts of the Internal

Revenue Service to go part way in meeting the *Miranda* requirements. See IRS News Release No. 897 of October 3, 1967, modified by IRS News Release No. 949 of November 26, 1968. It is clear from the latter Release (reported in full in 1968 P-H Fed. Taxes, Par. 55,476) that it is only when a person is in custody that IRS agents are directed to give the comprehensive statement of rights required by *Miranda*. The vital question of constitutional rights cannot be resolved on the basis of partial compliance with the law. Moreover, unless this Court determines the issue raised herein, tax investigations in one large area of the country (that embraced within the Seventh Circuit) will be conducted with full observance of *Miranda* requirements while in most of the remainder of the country only that portion of the *Miranda* warnings will be given which the Revenue Service chooses to give at the particular moment. We submit that it is of the utmost importance that this issue be resolved for the country as a whole.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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December 1969.

APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 132-3—September Term, 1969.

(Argued September 16, 1969 Decided October 10, 1969.)

Docket Nos. 33446-7

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

FRANCIS D. WHITE and GERTRUDE W. WHITE,
Defendants-Appellants.

Before: Moore, Hays and Anderson, Circuit Judges.

Appeal from a judgment of conviction and sentence, John O. Henderson, *Chief Judge,* in the Western District of New York, after a jury trial, against Francis D. White and Gertrude W. White for willfully attempting to evade their joint income taxes in violation of 26 U. S. C. § 7201, and for willfully making and subscribing federal income tax returns with knowledge of misrepresentations made therein in violation of 26 U. S. C. § 7206(1).

Both defendants were found guilty of violations in four counts under each statutory section, and the maximum fine under each count was imposed cumulatively upon both defendants. Thus, each defendant was fined a total of $40,000

for violations of § 7201 and, additionally, a total of $20,000 for violations of § 7206(1). Sentence as to imprisonment was suspended for both defendants and both were placed on probation for five years. As an express condition to the continuation of probation, each defendant was ordered to file within 30 days accurate past due tax returns and pay the same with full interest together with all penalties, including fraud penalties.

Conviction affirmed; remanded to the District Court for modification of the sentences by striking therefrom fines in the amount of $20,000 imposed upon each defendant for violations of § 7206(1), and for removal of the conditions of probation.

Charles K. Rice, Buffalo, N. Y. (Albert R. Mugel and J. F. Henry DeLange, Buffalo, N. Y., on the brief), for Defendants-Appellants.

Richard B. Buhrman, Attorney, Department of Justice, Washington, D. C. (Johnnie M. Walters, Assistant Attorney General, Department of Justice, and Joseph M. Howard, Attorney, Department of Justice, Washington, D. C., on the brief), for Plaintiff-Appellee.

MOORE, Circuit Judge:

I.

The primary point urged by appellants upon this appeal relates to the voluntariness with which they produced, during the investigation of their affairs by a Special Agent of the Internal Revenue Service Intelligence Division, the great bulk of the evidence used against them at trial. During the investigative sessions at which the incriminating

evidence came out, appellants were not told that a possibility then existed of criminal prosecution for tax evasion. The Special Agent admonished Francis White (referred to as "Francis")[1] that he was not required to answer any questions or turn over any personal records, but did not state specifically that anything he said might be used against him in a criminal prosecution. He was not advised of his right to counsel, nor was he advised that counsel would be furnished him in the event he qualified as an indigent. Thus appellant argues that he was not given the full *Miranda* warnings at the point when investigation of his affairs became essentially accusatory, see *Escobedo v. State of Illinois*, 378 U. S. 478 (1964), and that his Fourth and Fifth Amendment rights were therefore abridged by the admission of evidence garnered through the investigative interviews.

The case presented by appellants does not differ in any essential from the situation confronting this Court in *United States v. Mackiewicz*, 401 F. 2d 219 (2d Cir. 1968) and in *United States v. Squeri*, 398 F. 2d 785 (2d Cir. 1968). In *Mackiewicz* we held that questioning by a Special Agent under circumstances almost identical to these here presented did not create an atmosphere sufficiently coercive to generate the necessity for the full range of warnings contemplated by the *Miranda* decision for essentially "custodial" interrogations. Francis was interviewed by the Special Agent at his own place of business, in the presence of his accountant, and was interviewed once more in the office of his accountant, who was again present throughout

[1] Both Francis and Gertrude White were convicted on the evidence produced in Agent Martin's investigation. The books, records and statements which appellants sought to suppress, however, were turned over to the investigator as a result of, and during, interviews with Francis alone. Mrs. White does not claim any failure of consent or any right to suppress evidence against her based on failure of consent, since their joint returns, for which they are both liable, formed the basis of the prosecution.

the interview. Under these circumstances, Francis's confrontations with the Service's Intelligence Division was not inherently coercive, and he and his wife were not entitled to suppress evidence against them garnered from that confrontation on the basis of *Miranda*. In accord with this view are decisions in seven other Circuits: *Morgan v. United States*, 377 F. 2d 507 (1st Cir. 1967); *United States v. Mancuso*, 378 F. 2d 612 (4th Cir. 1967); *Agoranos v. United States*, 409 F. 2d 833 (5th Cir. 1969); *United States v. Mains*, 378 F. 2d 716 (6th Cir. 1967); *Cohen v. United States*, 405 F. 2d 34 (8th Cir. 1969); *Feichtmeir v. United States*, 389 F. 2d 498 (9th Cir. 1968); and *Hensley v. United States*, 406 F. 2d 481 (10th Cir. 1969). Contra, *United States v. Dickerson*, ____ F. 2d ____, 38 U. S. L. W. 2133 (7th Cir., July 28, 1969).

Aside from the *Miranda*-based decisions, appellant asserts the novel proposition that the government's right to introduce evidence obtained from Francis is even more narrowly circumscribed by the requirements for voluntariness of "confessions" under 18 U. S. C. § 3501. That section lists five factors which a Judge should consider in his determination of voluntariness before submission of the evidence to the jury. From this appellant argues that disclosures and evidence sufficiently voluntary to be admissible under *Miranda* nevertheless may be involuntary as a matter of law under the Omnibus Crime Control and Safe Streets Act of 1968.

That contention does not require extended discussion. It is sufficient to note that neither the language of § 3501 nor its legislative history indicate that Congress intended to expand the protection of potential criminal defendants beyond the scope of protection established by the *Miranda* line of cases.

II.

Special Agent Martin, whose investigation in 1962 formed the basis of the prosecution against the Whites in this case, testified at trial concerning his investigation. Martin also had testified for the Government before the grand jury in 1965 but no record of his grand jury testimony was kept. However, minutes were kept and a record made of the testimony of all defense witnesses at the grand jury hearing.

Appellant argues, on authority of our decision in *United States v. Youngblood*, 379 F. 2d 365 (2d Cir. 1967), that a defendant in a criminal case is entitled to a transcript of all testimony against him given before the grand jury. We noted in *Youngblood* that transcripts of testimony at grand jury hearings in this Circuit are now regularly kept and filed away, but that this "may not always have been the practice, and where it has not been we do not imply that a defendant is entitled as of right to minutes that do not exist." 379 F. 2d at 370, fn. 4.

Had this failure occurred subsequent to our decision in *Youngblood, supra*, very possibly a different question would have been presented. However, *Youngblood* was given prospective application only, and the indictment against the Whites was returned two years prior to that decision. Minutes of Agent Martin's testimony were not made at the grand jury hearing in 1965. Since they did not exist at the date of decision in *Youngblood*, his trial testimony cannot now be held improperly admitted on that basis.

III.

The Government adduced evidence at trial showing that Francis maintained a separate personal bank account in a

neighboring town in which he deposited large amounts of currency from unidentified sources. The evidence was offered to show the wilfulness of his conduct in seeking to conceal his financial activities or mislead others who had an interest in his financial affairs. *Spies v. United States*, 317 U. S. 492, 499 (1943). White's accountant, who prepared his tax returns, was unaware of the separate account and the large cash deposits. Appellant contends that this evidence was prejudicial and improperly admitted, suggesting that the jury may have erroneously inferred that these cash deposits represented still other unreported income, unrelated to the specific items upon which the evasion indictments were based.

In cases involving income tax evasion, evidence purporting to show the wilfulness of misconduct through extensive dealings in cash is properly admissible. *E.g., Gariepy v. United States*, 189 F. 2d 459, 463 (6th Cir. 1951); *Schuermann v. United States*, 174 F. 2d 397, 398 (8th Cir. 1949). The Government's proof showed that a large number of checks were cashed by the Whites throughout the period covered by the indictment instead of being deposited to the proper business accounts. Cash deposits in the separate bank account thus had a substantial tendency to prove their intent in converting unreported income received in check form into cash. The value of this evidence as proof of a material element in the case overcame whatever prejudice might have operated against appellants through improper inferences made by the jury on the evidence, and the evidence was therefore properly admitted.

IV.

Several items charged in the indictment as unreported income were in the form of checks from a corporation con-

trolled by Francis. The Government introduced evidence that those payments were entered on the paying corporation's books as expense items. This evidence was offered for the purpose of showing that the payments were not repayments of loans or other items which would not represent reportable income to the Whites. Appellants argue that this evidence was improperly admitted because it may have raised the inference of misdealing by the corporations, which was not charged in the indictment. However, as was the case with the cash deposits, any prejudicial inference was overbalanced by the positive value of the evidence in showing a material element of the case; *i.e.*, the income nature of the Whites' receipts, and its admission was not reversible error.

V.

The indictment brought by the Government against the Whites charged each defendant with (a) four counts (for the years 1958, 1959, 1960, 1961) of wilful attempts to evade or defeat income taxation under 26 U. S. C. § 7201, and (b) four separate counts (for the same years) under 26 U. S. C. § 7206(1) for making and subscribing documents which contain "a written declaration that it is made under the penalties of perjury, and which he [the taxpayer] does not believe to be true and correct as to every material matter." The documents were signed joint tax returns for the four years of the indictment period. The prosecutions under § 7201 were based on understatements of income and overstatements of expenses in the four-year series of filed returns, together with proof of overt acts by both defendants tending to show the wilfulness of their affirmative efforts to evade the tax.

The jury returned a verdict of guilty on all eight counts against each defendant. Each was subsequently sentenced to the maximum fine of $10,000 for each violation of § 7201, totaling $40,000. Each was additionally sentenced to the maximum fine of $5,000 for each violation of § 7206(1), which provides a felony penalty for perjured returns whether or not a wilful attempt to evade or defeat payment of taxes is shown. Total fines under this section were $20,000 for each defendant. We affirm the convictions on all counts, but the additional fines for violation of § 7206(1) must be vacated. *United States v. Lodwick*, 410 F. 2d 1202, 23 AFTR 2d 69-1760 (8th Cir., May 22, 1969); *Gaunt v. United States*, 184 F. 2d 284, 290 (1st Cir. 1950), *cert. denied* 340 U. S. 917, rehearing denied 340 U. S. 939 (1951). Under the circumstances of this case, the perjured returns were "incidental step[s] in the consummation of the completed offense of attempted defeat or evasion of tax." *Gaunt, supra* at 290, and as such each offense constituted a "crime within a crime" under the lesser included offense doctrine. *Id.* Both offenses charged were properly submitted simultaneously to the jury, but the cumulative fines, insofar as they exceeded the maximum possible fine under the greater offense charged in § 7201, constituted an unauthorized pyramiding of penalties.

Section 7206(1), although it charges an offense separate and distinct in itself, is only one part in a comprehensive statutory scheme to prohibit and punish fraud occurring in the assessment and collection of taxes by the government. Section 7201 is the inclusive section, prohibiting all attempts to evade or defeat any tax *in any manner*, and such an attempt is punishable as a felony. There follows a series of sections prohibiting specific methods of fraud in the collection and payment of taxes, all of which are sep-

arately punishable standing alone. Among these are §§ 7203, 7206 and 7207, all directed against the taxpayer. Other sections are directed at persons involved in the process of tax collection. Section 7203 prohibits the failure to file a return, supply information or pay a tax. Section 7207 prohibits the filing of fraudulent returns, statements or other documents required by the Service. Both these sections have been held by the Supreme Court to constitute, under appropriate circumstances, lesser offenses included within the prohibition of § 7201. *Sansone v. United States*, 380 U. S. 343 (1965). Section 7206(1) provides penalties for signing, under oath, false returns or statements made in the process of tax collection. The offense charged is perjury, the operative element is the signature under oath, and the felony penalties reflect the seriousness of this method of committing fraud. Thus the perjury offenses charged under § 7206 may separately form the basis for an indictment; but where proof of wilfully attempted evasion under § 7201 also proves, as an incident to the wilful evasion, the preparing and subscribing of a fraudulent return, the specific form of fraudulent conduct merges into the inclusive fraud charged under § 7201. To cumulate penalties beyond the maximum authorized by § 7201 is, therefore, improper under these circumstances, and the $20,000 in additional fines assessed against each appellant on the § 7206(1) counts must be vacated.

VI.

The sentencing court suspended the additional sanction of imprisonment against the Whites, placing them both on probation for five years. Continuation of probation was expressly conditioned, however, upon their payment, within 30 days, of all existing tax liabilities together with full interest and all penalties, including the fraud penalties.

In imposing these conditions, the trial court referred to information it had received from the Internal Revenue Service assessing appellants' civil liability for the four years covered by the indictment. However, that figure represented only a computation by the Service, and the Government concedes that the appellants here are entitled to litigate that civil liability before payment. It is further conceded that the conditions imposed on appellants' probation would hamper the determination by legal process of the civil liability. For these reasons, the conditions attached to probation must be removed. *United States v. Taylor*, 305 F. 2d 183 (4th Cir.) *cert. denied* 371 U. S. 894, *rehearing denied* 371 U. S. 943 (1962); *United States v. Stoehr*, 196 F. 2d 276 (3d Cir.) *cert. denied* 344 U. S. 826 (1952).

The judgment of the District Court is modified by striking therefrom the $40,000 in fines applicable to the convictions under 26 U. S. C. § 7206(1), and is remanded for removal of the conditions to probation; in all other respects, the judgment is affirmed

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of October, one thousand nine hundred and sixty-nine.

Present: Hon. Leonard P. Moore,
Hon. Paul R. Hays,
Hon. Robert P. Anderson, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCIS D. WHITE and GERTRUDE W. WHITE,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

Cal. #132
Cal. #133

United States Court of Appeals
Second Circuit

Filed October 10, 1969

A. Daniel Fusaro, Clerk

Opinion of District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
vs.
FRANCIS D. WHITE and GERTRUDE W. WHITE.

No. 8821-C.

Thomas A. Kennelly, Esq., Acting United States Attorney (Robert H. Purl and James F. Walker, Esqs., Attorneys, Tax Division, Department of the Justice, of Counsel), for the United States.

McDonough, Boasberg, McDonough & Beltz (Charles J. McDonough, Esq., of Counsel), Attorneys for the Defendants.

This is a motion to suppress records, books and admissions obtained by the government from the defendants who have been indicted for willful tax evasion and for sub-

scribing false statements with respect to amounts of income.[1]

A hearing revealed the following facts. On June 7, 1962, Charles J. Martin, a Special Agent assigned to the Intelligence Division of the Internal Revenue Service, received an assignment to investigate the tax returns of the defendants. This was pursuant to a referral by Revenue Agent Judson Heck who had previously investigated defendants' tax returns for the year 1959. Special Agent Martin, on June 18, 1962, met with Heck and discussed the case with him. The following day both agents went to the business address of defendant Francis D. White for an appointment which had been arranged at agent Heck's request. They met with James Cornell, the defendant's accountant, and Martin was introduced to Cornell by Heck as a "Special Agent, Intelligence Division." Cornell inquired as to why the Intelligence Division was in the case. Martin stated that he was investigating income not reported regarding dividend income, interest income and equipment expense items. He does not recall if he specifically mentioned fraud in his response. After approximately ten minutes' conversation with Cornell, the defendant, Francis D. White, arrived and Martin was introduced to him in the same manner and presented White with his pocket commission. Martin stated that his purpose was to obtain explanations for certain items Heck had uncovered and explained to White that he was not required to answer any questions or to turn over any records. White responded that he did not know that he was not required to cooperate but that he would cooperate. Martin requested an informal interview with White which was conducted later that day at the ac-

[1] Defendants are under indictment alleging four counts of violation of Title 26 § 7201 U. S. C. and four counts of violation of Title 26 § 7206(1) U. S. C. for the years 1958 through 1961, inclusive.

countant's office and concerned White's personal history, net worth and business transactions. The interview lasted approximately one and one-half to two hours and at the conclusion of the interview White agreed to furnish Martin with books and records for the years 1955 through 1961, inclusive. It is undisputed that White was never advised of his right to counsel or that anything he said might be used against him. Agent Martin further testified that there was never any mention of the possibility of criminal prosecution, although the likelihood existed at that time. Thereafter, according to an agreement between Martin and White, Special Agent Martin periodically received books and records of White by calling the accountant and requesting them.

Two other personal interviews were conducted on July 9, 1963 and November 7, 1963. The defendant, Gertrude W. White, was also interviewed on November 7, 1963, and she was advised during the interview that she did not have to answer any questions at that time. No other warnings were given to either defendant at any time, although Special Agent Martin admitted that a possibility of criminal prosecution was more likely at the time of the July 1963 interview. On April 14, 1964, the defendant, Francis D. White, refused to submit to a question and answer interview under oath, and on May 27, 1964, Special Agent Martin submitted his final report, recommending criminal prosecution.

The defendants contend that after the case was referred to the Intelligence Division of the Internal Revenue Service, the special agent involved was required to warn the defendants of their constitutional rights, including the right to counsel. See generally *Miranda v. Arizona*, 384 U. S. 436 (1966); *Escobedo v. Illinois*, 378 U. S. 478 (1964). They cite the recent Supreme Court case of *Mathis v. United*

States, ____ U. S. ____, 36 L. W. 4279 (May 6, 1968), together with district court cases upholding this view.[2]

Since this motion was argued before the court, the Second Circuit Court of Appeals has decided the case of *United States v. Mackiewicz*, ____ F. 2d ____, slip opinion page 3055. That court, presented with the same questions, rejected these contentions. Judge Moore, speaking for the court, held that the full-blown *Miranda* warnings were unnecessary and that to require them would clutter already difficult administrative tasks and tend to hinder the efficient collection of taxes. Slip opinion page 3060.

Miranda and *Mathis* both involved "in-custody" situations with the unquestioned deprivation of freedom of action in a significant way attendant thereto. While it is true that the entrance of a special agent into a tax investigation is not objectively an encouraging sign for the individual taxpayer, *United States v. Turzynski*, 268 F. Supp. 847 (N. D. Ill. 1967), to equate this with the custody requirement of *Miranda* is a rather far-reaching step. This court is impressed with the fact that the full Miranda warnings would require the assignment of counsel in cases of indigent taxpayers. Certainly, the entrance of an intelligence agent is not tantamount to the usual case of custody, *i.e.*, arrest and/or indictment. In the latter situation the possibility of criminal prosecution is not a mere likelihood, it is a fact.

It also seems apparent that the evils which necessitated *Miranda*, namely, the private interrogation of a suspect by law enforcement officers using psychiatric and/or physical

[2] United States v. Wainwright, 21 Am. Fed. Tax R. 2d 1039 (D. Colo. 1968); United States. v. Turzynski, 268 F. Supp. 847 (N. D. Ill. 1967); United States v. Kingry, 19 Am. Fed. Tax R. 2d 762, U. S. Tax Cas. 67-1 ¶ 9262 (N. D. Fla. 1967); U. S. Tax Cas. 67-1 ¶ 9393 (N. D. Fla. 1967); United States v. Gower, 271 F. Supp. 655, 20 Am. Fed. Tax R. 2d 5223 (Middle D. Pa. 1967).

methods to extract admissions or confessions in an incommunicado police-dominated atmosphere, do not apply to the facts presented here. The court concludes that the referral to the special agent does not require the *Miranda* warnings, *United States v. Mackiewicz, supra;*[3] that the action of the agents was in no way fraudulent, insidious or dishonest; and that the admissions, books and records were obtained from the defendants because they unequivocally, specifically and intelligently consented thereto in the hope of convincing the agents that any discrepancies in their tax returns were minor and without fraudulent intent. Now that it is apparent that their attempts to explain the discrepancies were unsuccessful, they should not be allowed to complain. Accordingly, the motion to suppress is denied.

So ordered.

/s/ JOHN O. HENDERSON,
United States District Judge.

Dated: July 22, 1968.

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[3] *See also* Schlinsky v. United States, 379 F. 2d 735 (1st Cir. 1967), *cert. denied*, 389 U. S. 920 (1967); Spinney v. United States, 385 F. 2d 908 (1st Cir. 1967), *cert. denied*, 390 U. S. 921 (1968); Mancuso v. United States, 378 F. 2d 612 (4th Cir. 1967), *cert. denied*, 390 U. S. 955 (1968); Fishmann v. United States, 380 F. 2d 832 (8th Cir. 1967), *cert. denied*, 389 U. S. 976 (1967); Richey v. United States, 360 F. 2d 32 (9th Cir. 1966), *cert. denied*, 385 U. S. 835 (1966).

Order on Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANCIS D. WHITE and GERTRUDE W. WHITE,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

LEONARD P. MOORE,
PAUL R. HAYS,
ROBERT P. ANDERSON,
Circuit Judges.

November 3, 1969.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

FRANCIS D. WHITE AND GERTRUDE W. WHITE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 898

FRANCIS D. WHITE AND GERTRUDE W. WHITE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioners were convicted of having wilfully attempted to evade their joint individual income taxes for the years 1958 through 1961, in violation of Section 7201 of the Internal Revenue Code. They were also convicted, for the same years, of having wilfully made and subscribed, under penalties of perjury, income tax returns which they did not believe to be true and correct as to every material matter, in violation of Section 7206(1) of the